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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUL - 7 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
MCI Telecommunications Co., Inc. )  
 )  
Petition for Expedited Declaratory Ruling )  
Preempting Arkansas Telecommunications )  
Regulatory Reform Act of 1997 pursuant to )  
§§ 251, 252 and 253 of the Communications )  
Act of 1934, as amended )

DOCKET FILE COPY ORIGINAL  
CC Docket No. 97-100

**AT&T COMMENTS**

Pursuant to the Commission's Public Notice DA 97-1190, released June 6, 1997, AT&T Corp. ("AT&T") submits these comments on the petition for expedited declaratory ruling filed by MCI Telecommunications Co., Inc. ("MCI") in the above-entitled proceeding on June 3, 1997. AT&T agrees with MCI that the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") conflicts with the Telecommunications Act of 1996 ("1996 Act" or "Act") in material respects and that certain provisions of the Arkansas Act therefore are preempted by the Act and the Commission's rules.

**ARGUMENT**

The 1996 Act sought to eliminate legal and practical barriers to competition in all telecommunications services, including local exchange services. For this purpose, Section 253(a) of the Act provides that "[n]o State . . . statute . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate

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telecommunications services," and Section 251 imposes a number of interconnection, unbundling, resale, and related requirements on incumbent local exchange carriers ("incumbent LECs") that are designed to facilitate the development of effective local exchange competition. Sections 252(c) and 252(f)(2) of the Act further impose a duty on state commissions to ensure that incumbent LECs in their states adopt interconnection, unbundling, resale, and other arrangements that satisfy the incumbent LECs' duties under Section 251, 252 and the Commission's implementing regulations. In addition, Sections 214 and 254 establish requirements for the provision of universal service.

Complementing these provisions, Section 253(d) of the Act provides that the Commission shall preempt any state statute which has the effect of creating a barrier to entry or inhibiting competition in any telecommunications service in violation of Section 253(a). Further, Section 251(d)(3) preempts state laws or regulations that are inconsistent with the requirements of Section 251 or that would substantially impair their implementation or the purposes of this part of the Act. Moreover, Section 254(f) prohibits state universal service requirements that are "inconsistent" with those in the 1996 Act and the Commission's rules. These provisions of the Act compel the preemption of those portions of the Arkansas Act which are the subject of MCI's petition, specifically Sections 4, 5, 9(d), 9(g), 9(i), and 10.

**I. THE COMMISSION HAS AUTHORITY TO PREEMPT THE PROVISIONS IDENTIFIED IN MCI'S PETITION.**

As MCI's petition demonstrates, provisions of the Arkansas Act, individually and in combination, have the effect of creating barriers to entry into the Arkansas local services market in violation of Section 253(a). The Commission therefore should confirm

that these provisions are preempted under Section 253(d) of the Act. This conclusion is not altered in any way by Section 253(b) of the Act, which preserves state regulatory authority to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Congress made clear that "[s]tates may not exercise this authority in a way that has the effect of imposing entry barriers" preempted by Section 253(a).<sup>1</sup> Further, the provisions of the Arkansas Act are not imposed on a "competitively neutral basis" and also are not "necessary" to any of the permissible state purposes identified in Section 253(b). Instead, they are designed specifically to preserve the market power of incumbent LECs in Arkansas.

In addition, the identified provisions are subject to the Commission's long-standing authority to preempt state statutes or regulations that would negate or interfere with federal regulatory objectives.<sup>2</sup> Sections 214, 251, 252 and 254 of the 1996 Act, among others, impose a number of new federal obligations on local exchange carriers in furtherance of the Act's objective of achieving competitive markets in all telecommunications services, including the provision of local exchange service. Accordingly, any state law or regulation that imposes requirements contrary to or

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<sup>1</sup> H.R. REP. No. 104-458, 104<sup>th</sup> Cong., 2d Sess., p. 126.

<sup>2</sup> See, e.g., Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986); California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994); Maryland Public Service Comm'n v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1332-33 (D.C. Cir. 1989); National Ass'n of Regulatory Utility Comm'rs v. FCC, 880 F.2d 422, 429-31 (D.C. Cir. 1989).

inconsistent with these federal requirements is also subject to preemption by the Commission on that ground.

This is confirmed by both Sections 251(d)(3) and 254(f). Section 251(d)(3) preserves only those state access and interconnection regulations that are "consistent with the requirements of [Section 251]" and do not "substantially prevent implementation" of Section 251's requirements. Similarly, Section 254(f) permits a state to adopt universal service regulations "not inconsistent with the Commission's rules." The clear import of these sections is that any state regulation that does not comply with these requirements is not preserved and is preempted by the Act.<sup>3</sup>

Moreover, preemption may occur even when Congress has not fully foreclosed state regulation in a specific area if state law conflicts with federal law. State law is preempted where it is in "irreconcilable conflict" with federal law,<sup>4</sup> where compliance with both state and federal law is an "impossibility,"<sup>5</sup> or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>6</sup>

All of these circumstances are present here, because enforcement of the Arkansas Act would violate several requirements of Sections 214, 251, 252 and 254 of the 1996 Act and the Commission's implementing regulations.

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<sup>3</sup> That is likewise the import of Section 261(b), which provides that the 1996 Act does not "prohibit" state regulations that are prescribed or enforced "in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part" – thus confirming that regulations that are inconsistent with the provisions of the 1996 Act are prohibited.

<sup>4</sup> See Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

<sup>5</sup> See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

## **II. THE PROVISIONS OF THE ARKANSAS ACT IDENTIFIED IN MCI'S PETITION CONFLICT WITH THE 1996 ACT.**

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The underlying premise of the Arkansas Act is to protect incumbent local telephone monopolies from the competition Congress sought to ensure through the 1996 Act. In key respects, the Arkansas Act conflicts with the requirements of the Act and the Commission's implementing regulations. The Commission should confirm that these provisions are preempted because they conflict with the Act and have the effect of prohibiting the ability of potential entrants to enter the local market in Arkansas.

### **A. The Attempted Exclusion of Services from an ILEC's Resale Obligations in Section 9(d) of the Arkansas Act Conflicts with the 1996 Act.**

Section 9(d) of the Arkansas Act bluntly states that "[p]romotional prices, service packages, trial offerings or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale." § 9(d). This attempted limitation of the services an ILEC must make available for resale conflicts with Section 251(c)(4) of the 1996 Act, which requires that an ILEC offer for resale at wholesale rates "any" retail telecommunications service that it provides to end users. It also conflicts with the Commission's holding in its First Report and Order that this resale obligation extends to service packages and promotions longer than 90 days.<sup>7</sup>

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<sup>6</sup> See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

<sup>7</sup> First Report and Order, Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, (Aug. 8, 1996) ("First Report and Order"), ¶ 948 (promotions), ¶ 877 (bundles of service offerings). In addition, § 251(b)(1) requires an incumbent LEC to offer for resale services subject to promotions of less than 90 days at the promotional rate.

**B. The Attempted Establishment of Improper Criteria for Determining the Wholesale Rate for Resale Services in Section 9(g) of the Arkansas Act Conflicts with the 1996 Act.**

Section 9(g) of the Arkansas Act requires that the wholesale rate for resale services be calculated by subtracting from the retail rate "any net avoided costs." Such net avoided costs shall be calculated as "the total of the costs that will not be incurred by the local exchange carrier due to it selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale." In the First Report and Order, however, the Commission recognized that permitting incumbent LECs to determine wholesale rates based upon the costs they actually avoided "would allow incumbent LECs to sustain artificially high prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable," and that Congress did not intend such a result (§ 911). The Commission therefore rejected arguments that an incumbent LEC "must actually experience a reduction in its operating expenses for a cost to be considered 'avoided.'" Id. Instead, the 1996 Act requires state commissions in calculating the wholesale rate to make an objective assessment of what costs are "reasonably avoidable" when an incumbent LEC sells its services at wholesale (id.).

**C. The Arkansas Act's Requirement in Section 9(i) that Statements of Generally Available Terms and Conditions Be Automatically Approved Conflicts with the 1996 Act.**

Section 252(f)(2) of the Act prohibits a state commission from approving a Statement of Generally Available Terms and Conditions ("SGAT") "unless such statement complies with [Section 252(d)] and Section 251 and [the Commission's] regulations thereunder." Section 9(i) of the Arkansas Act, however, requires the state commission "to approve any statement of generally available terms unless it is shown by clear and

convincing evidence that the . . . statement does not meet the minimum requirements of Section 251 of the Federal Act."

Section 9(i) of the Arkansas Act is clearly inconsistent with Section 252(f) of the Act, and is therefore preempted. As a preliminary matter, Section 252 requires the state commission, in reviewing an SGAT, to consider not only Section 251 but Section 252(d) as well. The Arkansas Act, however, does not explicitly require the state commission to consider Section 252(d).<sup>8</sup> More fundamentally, Section 9(i) purports to relieve the state commission from making affirmative findings that a proposed SGAT complies with the Act as a prerequisite to its approval. That is clearly contrary to Section 252(f), which requires the state commission to reject any SGAT absent such findings.<sup>9</sup>

**D. The Arkansas Act's Provisions relating to Rural Telephone Companies Conflict with the 1996 Act.**

Section 10 of the Arkansas Act attempts to establish criteria for exempting rural telephone companies from the requirements of Sections 251 and 252 of the 1996 Act. As MCI demonstrates in its petition, the Arkansas Act's criteria for exempting rural

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<sup>8</sup> The pricing requirements of Section 252(d) are an integral part of Section 251's requirements that an incumbent LEC provide access to its network elements on rates that are in accordance with Section 252 (§ 251(c)(3) and that an incumbent LEC offer services for resale at wholesale rates (§ 251(c)(4)). To the extent that the Arkansas Act purports to require or authorize the state commission to approve an SGAT without considering the requirements of Section 252(d), it is preempted. Similarly, to the extent the Arkansas Act purports to authorize the state commission to ignore the Commission's regulations, that is an additional ground for preemption.

<sup>9</sup> The Arkansas Act's treatment of negotiated agreements also conflicts with the 1996 Act. Section 252(e) of the Act provides that a state commission may reject a negotiated agreement if the agreement discriminates against another carrier or if the agreement is inconsistent with the public interest. In contrast, Section 9(i) of the Arkansas Act requires approval of a negotiated agreement unless it is shown by clear and convincing evidence that the minimum requirements of Section 251 have not been met.

telecommunications providers from the 1996 Act's requirements are broader than those permitted by the Act, and would thwart Congress's intent that "exemption . . . should be the exception rather than the rule." First Report and Order, ¶ 1262. Further, the Commission's regulations provide that once a rural telephone company receives a bona fide request for interconnection, it bears the burden of proving to the state commission that interconnection would be unduly economically burdensome, is not technically feasible, or is not consistent with the universal service provisions of Section 254 of the Act:

[A] rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.

47 C.F.R §51.405(a). The Arkansas Act (§ 10(b)) would turn this limited exemption on its head by requiring requesting carriers to demonstrate by "clear and convincing evidence" that removal of the exemption is warranted. Both the shifting of the burden to the requesting carrier, and the standard of proff required (*i.e.*, "clear and convincing") are inconsistent with the Act and the Commission's regulations, and are preempted.

**E. The Arkansas Act's Provisions relating to Universal Service Conflict with the 1996 Act.**

MCI's petition confirms ACSI's previous showing in this proceeding that the Arkansas Act's universal service provision conflict with federal universal service requirements in violation of Section 254(f), which prohibits such inconsistency.<sup>10</sup> The universal service provisions of the 1996 Act are designed to ensure (i) affordable telephone service, (ii) without impairing the prospects for local competition by requiring competitive neutrality with respect to the collection and disbursement of universal service

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<sup>10</sup> See AT&T Comments, filed May 5, 1997, in this proceeding.



subsidies. In contrast, the universal service provisions of the Arkansas Act are designed not to promote universal service, but to protect incumbent LECs from the effects of competition, at the expense of new entrants. Neither the size of the state universal service fund nor carrier eligibility for disbursements depends on the cost of service being provided or other legitimate universal service considerations. The Arkansas Act thus is inconsistent with Section 254(k) of the Act which requires that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."<sup>11</sup> In addition, Section 4(e)(5) of the Arkansas Act would require that incumbent LECs receive universal service support based on "all net investment, including imbedded investment" used in the provision of universal service. This conflicts with the Act's and the Commission's requirement that universal service support be based on forward-looking, rather than embedded, costs.<sup>12</sup>

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<sup>11</sup> As the Arkansas PSC Staff recognized in its staff analysis (p. 5):

[The Arkansas Act] is designed as an automatic revenue replacement mechanism to recover any reductions resulting from changes in the federal universal service fund, changes caused by new or existing federal or state regulatory or statutory directives, or changes in intrastate or interstate switched access service revenues, net revenues received from the Arkansas Intrastate Carrier Common Line Pool, interstate access charge pools, or the Arkansas IntraLATA Toll Pool. All of these revenue replacement measures are guaranteed without regard for the actual cost of providing universal service, comparability of rural to urban rates, or the actual earnings of the incumbent LEC.

A copy of the staff analysis is filed as Exhibit A to AT&T's Comments, filed May 5, 1997.

<sup>12</sup> 1996 Act, § 254(k); Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997) ("Universal Service Order"), ¶ 227.

The Arkansas Act also improperly attempts to limit the ability of new entrants to become eligible for universal service support. Section 5(b)(2) attempts to limit such support to that portion of an eligible carrier's network facilities that it "owns and maintains," thereby precluding support where a carrier provides service using unbundled network elements. The Commission has made clear, however, that a carrier providing service using unbundled network elements is eligible for universal service support.

Universal Service Order, ¶ 164.

### CONCLUSION

The provisions of the Arkansas Act identified by MCI in its petition are inconsistent with federal regulatory objectives and create impermissible barriers to entry into the Arkansas local services market. For the reasons set forth above, the Commission should confirm that these provisions of the Arkansas legislation are preempted by the Act and the Commission's rules.<sup>13</sup>

Respectfully submitted,

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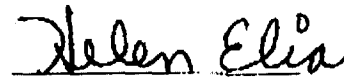
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<sup>13</sup> AT&T takes no position at this time on MCI's request that the Commission preempt the Arkansas PSC's jurisdiction over Section 252 arbitrations.

## CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 7<sup>th</sup> day of July, 1997, a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service:

  
Helen Elia

July 7, 1997

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